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Group-Washington

January 6, 1997

DOCKET FILE COPY ORIGINAL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

[redacted]

Dear Mr. Caton:

Re: *CC Docket No. 96-238, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of its *"Comments"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Denice Harris

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing	)	
Procedures to Be Followed When	)	
Formal Complaints Are Filed Against	)	
Common Carriers	)	
	)	

COMMENTS OF PACIFIC TELESIS GROUP

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Date: January 6, 1997

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Formal Complaints Are Filed Against	)	
Common Carriers	)	
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COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group ("PTG") submits these Comments in the above-captioned proceeding.

I. SUMMARY AND INTRODUCTION

In the *Notice of Proposed Rulemaking* ("*NPRM*"), the Commission states that "at a minimum, the procedures that [it] ultimately adopt[s] in this proceeding will facilitate the full and fair resolution of complaints filed under the new statutory complaint provisions within the deadlines established by Congress." *NPRM*, para. 2. The Commission states that it intends to go beyond this minimal goal, "however, to establish rules of practice and procedure which, by providing a forum for prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by BOCs

and other telecommunications carriers, will foster robust competition in all telecommunications markets."

We support the Commission in all these goals. Our comments demonstrate our agreement that "prompt resolution" is necessary but not enough; resolution must also be "full and fair" to all parties. Otherwise, the prompt resolution of complaints will not foster robust competition. Instead, it will encourage competitors to bring unwarranted complaints in order to harm other competitors and gain an advantage in the regulatory arena.

Certain of the Commission's proposals, with refinements, will help meet its goals. For instance, we believe that pre-filing settlement meetings can expedite complaints while helping to ensure that parties are able to fully and fairly prosecute and defend their cases. For this process to be effective, however, it is essential that the complainant provide personal service of a notice of the meeting on the defendant's agent at least 30 days prior to filing a complaint. Certain of the Commission's other proposals concerning format and content requirements for pleadings, discovery rules, bifurcation of liability and damages, and other matters will help expedite the fair resolution of complaints if adopted with our recommended revisions.

Some of the NPRM's proposals, however, would jeopardize the ability of parties to present their cases and defenses and would, thus, cause delays in the Commission's ability to fully and fairly resolve complaints. For instance, shortening the defendant's time to answer from 30 to 20 days, at the same time as placing more burdens on all parties, would unnecessarily harm defendants and be counterproductive

to the expeditious, fair handling of complaints. For similar reasons, briefs should continue to be allowed in all complaint proceedings. The parties' analyses of the relationship of the relevant facts to the applicable law in briefs will help the Commission decide complaints expeditiously.

In our experience, delay in the complaint process has not been caused by the time for answers and for briefing of cases. Proposals to shorten response periods and eliminate briefs in the complaint process will not assure that decisions on the complaint will be released more expeditiously. Of key importance to moving the process along, or ending it early if the complaint is defective, is for the Commission to adopt a timetable for its decisions on motions. We recommend that the Commission decide motions within 30 days after the time for filing oppositions to the motions.

The Commission "tentatively conclude[s] that the pro-competitive goals and policies of the 1996 Act would be enhanced by applying the rules proposed in this Complaint NPRM to all formal complaints, not just those enumerated in the 1996 Act." *NPRM*, para. 2. If the Commission adopts rules that incorporate our recommendations, we believe that the Commission could apply consistent rules to all formal complaints. If, however, the Commission concludes that it must take more severe action to meet the most restrictive deadlines established by Congress (e.g., the 90 day requirement in § 271), then the Commission should apply the more severe requirements only with regard to complaints subject to those most restrictive Congressional deadlines. For other complaint proceedings, our recommendations would remain appropriate.

We do not believe, however, that this dual approach to different types of complaints is necessary. We believe that adoption of the Commission's proposals, as amended and augmented by our recommendations, will help the Commission meet the Congressional deadlines. At the same time, our recommendations will help ensure that all parties retain the ability to fully and fairly present their cases and defenses, as required for both due process of law and for a healthy, competitive telecommunications industry.

II. THE COMMISSION SHOULD ENSURE THAT AMENDMENTS TO THE RULES OF PRACTICE AND PROCEDURE DO NOT JEOPARDIZE PARTIES' ABILITIES TO FULLY AND FAIRLY PROSECUTE AND DEFEND CASES WITHIN THE DEADLINES ESTABLISHED BY CONGRESS (¶¶ 21-87)

A. Pre-Filing Procedures and Activities Can Help Expedite The Complaint Process (¶¶ 27-29)

Properly Timed And Noticed Settlement Meetings Would Expedite Complaints -- The Commission tentatively concludes that it should require a complainant, as part of its complaint, to "certify that it discussed, or attempted to discuss, the possibility of a good faith settlement with the defendant carrier's representative(s) prior to filing the complaint." The Commission states, "The settlement discussion requirement should also encourage the parties to narrow issues and agree on relevant facts or identify facts in dispute well in advance of a complaint being filed with the Commission." *NPRM*, para. 28 (emphasis added).

We support this tentative conclusion. In order for this requirement to be effective, however, the Commission should require the complainant to serve a formal

Notice Of Attempt To Settle Dispute on the defendant's designated agent for service of process in Washington, D.C. setting forth all the issues in dispute. In order to ensure that this normally takes place "well in advance of a complaint being filed," the Commission should require that the complainant serve this Notice at least 30 days before filing a complaint, or include with the certification in the complaint a full justification for why the complainant was unable to provide 30 days notice. Without these requirements, a complainant might simply call any employee of the defendant carrier, and that carrier's attorneys or decision-makers might not know of the matter until the complaint is filed.

With these pre-filing requirements, the complaint may settle before it ever needs to be filed. Even if it does not, these requirements could help accelerate the complaint process by allowing the early gathering of documents and identification of witnesses. This approach is particularly important given the Commission's other proposals to accelerate the process and shorten deadlines that we discuss below.

A Committee of Experts Would Not Expedite Complaints -- The Commission also seeks comment on "whether a committee composed of neutral industry members would serve a needed role or useful purpose in addressing disputes over technical and other business disputes." Specifically the Commission asks "whether use of a committee of such experts would expedite the resolution of complaints within the statutory timeframes." *NPRM*, para. 29.

We do not believe that a "committee of experts" would expedite the resolution of complaints. In fact, this extra layer of administration probably would cause

delay. It would be difficult, if not impossible, to agree on who is a "neutral industry member." Moreover, in our experience, the complexity of technical issues has not been a major cause of significant delay in the complaint process.

B. Personal Service Of The Complaint On Defendant's Agent Should Be Required (¶¶ 30-35)

The Commission proposes that "a complainant would serve the complaint on an agent designated by the defendant carrier to receive such service." In addition, the Commission proposes that the answer period would begin to run once the complaint has been served by the complainant on the defendant in the manner prescribed by the rules." *NPRM*, para. 31.

Because the answer period would begin to run upon service of the complaint, and the Commission proposes to add significantly to what the defendant must include in the answer, it is essential that the complaint be deemed to have been served only upon personal service on the defendant's designated agent. Accordingly, the Commission's service proposals will meet the public interest only if the Commission also adopts its proposed rule 1.47(h).[1] That proposed rule requires that "[s]ervice of all notices, process, orders, decisions, and requirements of the Commission may be made upon such carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the District of Columbia." *NPRM*, Appendix A, § 1.47(h).

[1] *See NPRM*, Appendix A § 1.47(h). Proposed § 1.735(e) describes types of service for subsequent pleadings only.

This practice of serving on the agent is consistent with § 413 of the 1996 Act, and, in order to comply with that section and avoid confusion, the agent that a carrier designates under §413 should, of course, be the same as the agent designated for purposes of this proceeding. Personal service on the defendant's agent also is consistent with the Federal Rules of Civil Procedure[2] and is required for due process since "[a]ny defendant may be deemed in default and an order may be entered against the defendant in accordance with the allegations contained in the complaint." NPRM, Appendix A, § 1.724.

Personal service would be particularly essential if the Commission shortened the answer period to 20 days. We oppose that proposal, however, for reasons discussed in various sections below.

C. Format and Content Requirements Can Help Expedite The Complaint Process (¶¶ 36-46)

In Order To Expedite The Process, The Commission Should Require More Than A Bare "Notice-Type" Complaint -- The Commission proposes that "any party to a formal complaint proceeding must, in its complaint, answer, or any other pleading required during the complaint process, include full statements of relevant facts, and attach to such pleadings supporting documentation and affidavits of persons attesting to the accuracy of the facts stated in the pleadings." *NPRM*, para. 37. The Commission tentatively concludes that it "should require a complainant to append to its

[2] *See* Fed.R.Civ.P. 4(e)(2).

complaint documents and other materials to support the underlying allegations and request for relief set forth in the complaint." The Commission also tentatively concludes "that failure to append such documentation to a complaint will result in summary dismissal of the complaint." *NPRM*, para. 39.

We support the Commission's tentative conclusions concerning complaints. These proposals are reasonable and would help expedite the complaint process. As we explained in our Comments in Dockets 96-149 and 96-152, concerning complaints under §§ 271 and 274:

> To expedite the process and ensure the filing of meritorious suits, the Commission should require the complainant to file more than a bare 'notice-type' complaint. For example, the Commission should require the pre-filing of testimony, exhibits, and all other information relevant to support the claim, along with all requests for discovery. The opening case should only be supplemented with new, relevant material obtained through discovery.

Placing this requirement on complainants will not overly burden them because they control the timing of the filing of the complaint and can gather information prior to bringing the complaint. This requirement also is consistent with the complainant's burden of production.[3] Once the complainant has provided this information, the current rule, under which discovery of documents is by motion, properly

[3] In complaints under §271, the Commission decided that the burden of production is on the complainant unless and until it demonstrates a *prima facie* case, at which point that burden shifts to the BOC defendant. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, *First Report and Order,* released December 24, 1996, para. 345.

limits discovery to what is needed.[4] See our further discussion below in this section concerning documents.

It will be necessary for the complainant to provide detailed information in the complaint in order for the defendant to be able to provide the detailed answers proposed by the Commission. This requirement will allow the defendant to have time to see the information before filing an answer. The Commission should specify that it will accomplish the summary dismissal of the complaint mentioned in its proposal *sua sponte*, rather than in response to a motion, in order to reduce the number of unnecessary motions.

The proposed requirements concerning identification or attachment of documents should be rejected with regard to answers. These requirements would be onerous for the defendant who will have little time to find the appropriate employees, former employees, and documents. Providing a description and location of the documents would be almost as onerous as attaching the documents, since the most difficult and time consuming part of the process is finding the relevant documents. Accordingly, if the Commission adopts this proposal for defendants, it is essential that the Commission also retain the current 30 days for filing an answer and that the Commission permit defendants to amend answers without a motion as additional information comes to light. *See* Section D below concerning the Commission's specific proposal regarding answers.

[4] 47 C.F.R. § 1.730.

Complaints Based Solely On "Information And Belief" Should Be Dismissed -- The Commission seeks "comment on whether we should prohibit complaints that rely solely on assertions based on 'information and belief'." *NPRM*, para. 38. The Commission should adopt that prohibition. A complainant should be required to make some allegations based on its own or an employee's personal knowledge, in order to reduce the number of frivolous complaints, including those brought to harass defendants or as fishing expeditions.

Detailed Explanations Of Alleged Violations Would Expedite Complaints -- The Commission tentatively concludes that it should revise its rules "to require more specifically that a complaint include a detailed explanation of the manner in which a defendant has violated the Act, Commission order, or Commission rule in question." *NPRM*, para. 40. We support this proposal. More detailed complaints will help frame the issues, which is necessary in order for defendants to locate needed employees and documents quickly and prepare an answer.

Proposed Findings of Fact And Conclusions Of Law And Legal Analysis Cannot Be Properly Provided In Complaints And Answers -- The Commission proposes "to require that all pleadings that seek Commission orders contain proposed findings of fact and conclusions of law with supporting legal analysis." *NPRM*, para. 41. We support this proposal solely with regard to motion practice. Motions should include this information so that the nature of, and support for and opposition to, the motion can be quickly understood and the motion quickly decided.

These requirements, however, should not apply to complaints and answers. First, at the stage of filing complaints and answers the parties will not know if there will be any discovery. Where any discovery is needed, these determinations and analyses could not be conducted prior to that discovery because the needed facts would not yet be ascertained. Second, even in a case without discovery, the determinations and analyses could not be performed at this stage. The complainant cannot adequately apply all the facts to the law until it has reviewed the answer. The defendant cannot do so until it has adequate time to review and analyze all the information provided by the complainant and to locate its own employees and information.

The Commission's other proposals, discussed in this section, would make it so that even a case without formal discovery would have a substantial amount of information provided with the complaint and answer. The current and proposed time periods for answers are inadequate for these determinations and analyses. Attempting to provide them up-front would waste resources and frustrate the Commission's ability to make just decisions in an efficient manner. Whether or not there is discovery, the briefing stage is the proper time for the submission of findings of fact and conclusions of law with supporting legal analysis. *See* Section M below concerning the briefing process.

Some Of The Commission's Proposals Concerning Identification Of Individuals And Identification, Or Copying, Of Documents Would Be Counterproductive -- The Commission proposes to "require the complaint, answer,

and any authorized reply to include...(1) the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings, identifying the subjects of information; and (2) a copy of, or a description by category and location of all documents, data compilations and tangible things in the possession, custody, or control of the party that are relevant to the disputed facts alleged with particularity in the pleadings." *NPRM*, para. 43.

First, we oppose being required to provide the phone number of each individual. This information is not needed, is contrary to the goal of limiting discovery, and would invite ethical violations of contacting the defendant's employees directly rather than through counsel. All contacts should be through the parties' attorneys. Providing the names of the individuals, however, is useful for notices of depositions.[5] We recognize that the Federal Rules of Civil Procedure include provision of the phone number if known, "[e]xcept to the extent otherwise stipulated or directed by order or local rule...."[6] In Federal cases where many of the individuals may not be employees of a party or be represented by counsel, this requirement may have validity. Complaints before the Commission, however, are brought against carriers. Other than the complainant, the individuals who have relevant information are usually employees of the defendant carriers, who can be contacted through the carriers' attorneys.

Second, a requirement to provide a copy or description of all documents and related materials "that are relevant to the disputed facts" would be extremely broad

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[5] Although the Commission's rules do not allow depositions as of right, parties may bring motions to allow noticing and conducting of depositions. 47 C.F.R. § 1.730.

[6] Fed.R.Civ.P. 26(a)(1)(A).

and unworkable if applied to defendants. Defendants have many huge documents that may in some ways be relevant and yet not be material to resolving the dispute.

Third, once the detailed complaint has been filed, the Commission should apply the current document production rule. As noted above, the current rule, under which production of documents is by motion, properly limits discovery to what is needed. In our experience, the current requirement for discovery motions has not been a cause of significant delay. By limiting discovery, the current rule will help shorten the complaint process if it is combined with our recommendation that the Commission establish a set timetable for decisions on motions.

Fourth, if the Commission requires voluntary production of documents with the pleadings, the Commission should limit this production to documents that are "then reasonably available."[7] The complainant is in control of the timing of the filing of the complaint and could readily ensure that the complaint includes all reasonably available documents. The defendant, however, would need to be allowed sufficient time. This approach would reinforce the need to avoid shortening the time for answers. *See* Section D below.

Fifth, the complainant should be required to attach copies of the documents, not just identify them. The defendant would need to review all the designated documents. Even with 30 days to answer, it would be unreasonable to

[7] *See* Federal Northern Dist. Calif. Rule 16-5, which requires that "each party shall actually produce to all other parties all of the unprivileged documents which are then reasonably available and which tend to support the positions that the disclosing party has taken or is reasonably likely to take in the case."

force the defendant to make a separate request to receive copies or to travel to the complainant's locations to review them. Such travel would be extremely burdensome and time consuming since some complainants have documents at numerous locations all across the country.

Sixth, if the Commission adopts its proposal, the defendant would have to designate individuals and documents based on the complaint. The Commission should provide in its rules that parties may amend designations without leave of the Commission, if as the proceeding moves forward the issues become more refined or different than they first appeared. Of course, if the complainant revises issues or designations, the defendant must be allowed sufficient additional time to respond.

Seven, as discussed below, if disputes arise concerning the designation of individuals or production of documents, parties should be required to meet and confer prior to filing any motions to compel. This approach helps resolve disputes quickly.

D. 30 Days Is Essential For A Full And Fair Answer (¶ 47)

The Commission states: "[W]e propose to reduce the permissible time for a defendant to file an answer to a complaint from 30 to 20 days after service or receipt of the complaint. We tentatively conclude that this reduction is consistent with changes we have proposed regarding the form and content of pleadings and will not unduly prejudice the rights of any defendant." *NPRM*, para. 47.

We oppose this proposal. Although we agree that some of the Commission's proposals could improve the defendant's ability to efficiently prepare an answer, other proposals will make the task more onerous and time consuming. If the Commission adopts our recommendations discussed in Section A above concerning pre-filing discussions, these discussions should help improve the efficiency of the process, as should proposed requirements for more specificity in complaints. Other proposals, however, would require more time than is currently required. These latter proposals, some of which we oppose, include the requirements discussed in Section C above concerning the documents that must be attached or identified and individuals who must be identified in answers and other pleadings. Adoption of these proposals would necessitate retention of the 30-day period for answers.

Although the Federal Rules Of Civil Procedure require answers within 20 days, that time frame is inappropriate here because pleadings must be more than the "notice" pleadings required by the Federal Rules. For instance, under the Federal Rules disclosure of relevant individuals and documents is not required until 10 days after the meeting of the parties, and that meeting is not required until at least 14 days before a scheduling conference or order, which may not issue until as late as "90 days after the appearance of a defendant."[8] If the Commission were to adopt its proposal that proposed findings of fact and conclusions of law, as well as legal analysis, all be

[8] Fed.R.Civ.P. 26(a)(1) and (f) and Rule 16(b).

included in the answer, which we oppose in Section C above, more than 30 days would be needed to answer.[9]

The Commission previously proposed, and then rejected, reducing the time to file an answer from 30 to 20 days in CC Docket No. 92-26.[10] In response to that proposal, the Federal Communications Bar Association ("FCBA") expressed concerns that remain true today: "[T]he Association is concerned that shortened time periods for filing of pleadings will not result in more expeditious resolution of complaints. The lengthy delays do not appear to stem from the time periods for filing pleadings. Rather, lengthy delays occur after the pleading cycle has been completed."[11] The Commission concluded in that proceeding:

> With respect to answers to complaints, it is important that defendants are not unduly hampered in responding to the charges against them. We believe those parties opposing the reduced deadline have explained that the different procedures and requirements imposed by the Commission's rules and the Federal Rules of Civil Procedure justify different deadlines for parallel pleadings. In addition, these commenters have presented reasonable evidence that given the possible difficulties of gathering information regarding transactions up to two years old, the proposed time reduction would unreasonably impair a defendant's ability to answer fully the complainant's allegations without yielding a benefit sufficient to mitigate this added burden.[12]

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[9] As discussed above, the problems that would be caused by this proposal go beyond the problem of the amount of time required to perform the tasks.

[10] *Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 92-26, 8 FCC Rcd 2614, paras. 12 and 31 (1993). *("1993 Complaint Process Order").*

[11] Comments of the Federal Communications Bar Association, April 21, 1992, CC Docket No. 92-26.

[12] *1993 Complaint Process Order*, para. 12.

The *NPRM* does not mention anything that has changed that could affect its 1993 determinations on this issue, and the Commission's conclusions in that proceeding are as true now as they were then. We recognize that the Commission is concerned about the Congressional deadlines. We are too. The Commission observes that "the 90-day resolution deadline for complaints filed under Section 271, for example, does not afford us much freedom in this area." *NPRM*, para. 47. Nonetheless, reducing the time to answer by 10 days is not the solution. Rapid but fair resolution of the complaint depends on the defendant being able to fully respond up-front, which will help avoid confusion and delays in the Commission's subsequent decision process.

If, contrary to our advice, however, the Commission were to decide that a 90-day resolution deadline under Section 271 requires less than 30 days for an answer, then the Commission should limit that reduction to Section 271 complaints and not apply it to complaints under sections that allow more time for resolution of complaints. Moreover, Section 271 allows more than 90 days if the parties agree. If the Commission adopts a general 20 day requirement for answers under Section 271, it should not apply that reduced answer time if the parties agree up-front that resolution of the complaint may take more than 90 days.

E. Discovery Rules Should Be Adjusted To Help Expedite Complaints (¶¶ 48-56)

Limiting Self-Executing Discovery To 20 Written Interrogatories Would Help Expedite Complaints -- The Commission seeks comments on whether or not to eliminate the self-executing discovery permitted under current rules by prohibiting

discovery as a matter of right. *NPRM*, para. 50. As an alternative approach, the Commission seeks comments "on the benefits and drawbacks of a proposed rule that would limit self-executing discovery to something other than the thirty (30) written interrogatories authorized under the current rules." *NPRM*, para. 51.

We agree with the Commission's proposals aimed at enabling the staff to have more "control over the scope and timing of discovery as a means to expedite resolution of complaints" and believe that reducing the number of allowable written interrogatories would help achieve this goal. *See NPRM*, para. 51. We believe that if the Commission retains discovery as a matter of right, it should limit self-executing discovery to 20 written interrogatories. With the current limit of 30 written interrogatories, we find that complainants ask many questions that are not aimed at gathering information that is reasonably likely to help resolve the complaint. A limit of 20 would require parties to focus on what is likely to be important. The Commission also should strictly enforce its rule that the limit on written interrogatories is a limit on the number of single questions and cannot be violated by the inclusion of sub-parts to questions, or by use of compound questions.

A rule precluding any discovery as a matter of right may inhibit the development of facts necessary to resolve disputes, without expediting the complaint process. The Commission has freed many "non-dominant" carriers from many reporting requirements, making it more likely that some discovery will be needed. A limit of 20 written interrogatories appears to strike the proper balance.

Potential additional discovery could be discussed at the status conference, where the staff could help control its scope. If the staff were to review any additional discovery requests before they were presented to the other party, there would be a better chance that the propounding party would ask for relevant, precise information rather than conduct a fishing expedition or, as the Commission notes, "use discovery for purposes of delay or to gain tactical leverage for settlement purposes." *NPRM*, para. 51. In addition to insisting on clear relevance, the staff can balance the need for the information with the burden of the request. Such controls are particularly needed for Commission proceedings, which are substantially different than complaints before a federal district court. The potential for abuse of discovery is much greater in actions before the Commission where there are no discovery masters, no clear rules on admissibility of evidence, and long delays in rulings on discovery motions.

All Identified Documents Should Be Made Available Upon Staff Request -- The Commission invites comment on "whether relevant documents identified or exchanged, but not specifically relied upon by the identifying or exchanging party, should be filed with the Commission concurrent with the complaint or answer." *NPRM*, para. 54. As discussed above, copies of documents relied upon by the complainant should be attached to the complaint. Since they would be attached to the complaint, they would be filed with the Commission. Other documents that are discovered that are not specifically relied upon by the party, should be made available to the Commission staff upon request. There is no need to flood the staff with

documents. Parties will submit key documents with their briefs, along with their arguments concerning the relevance and importance of the documents.

The Cost Recovery Systems Proposal Would Not Help -- The Commission seeks comments on "the feasibility of allowing the parties to a complaint proceeding to agree among themselves to a cost-recovery system as a basis for facilitating the prompt identification and exchange of information each side believes is necessary for a full and fair resolution of the matters in dispute." *NPRM*, para. 54. We do not believe that Commission sanction of such a process would be helpful. It would simply raise new disputes over cost recovery, on top of the disputes in the complaint proceeding. Since, as the Commission acknowledges, it has no authority over this cost recovery, the new disputes could only be taken to court. The time consumed in this manner would not assist in expediting the Commission's proceedings.

Disputes Should More Readily Be Referred To ALJs -- We support the Commission's proposal to amend its rules to authorize the Common Carrier Bureau, on its own motion, to refer disputes to an administrative law judge for expedited hearing on factual issues in complaint cases involving disputes over material facts that cannot be resolved without resort to formal evidentiary proceedings. *NPRM*, para. 56. Not all complaint cases have straight-forward facts. Some cases require credibility determinations which cannot occur in paper submissions to the staff. For example, a complainant may allege that a carrier made certain statements that indicate liability, but the carrier may contend that no such statements were made. Written affidavits, or even depositions, would not be helpful in resolving this conflict. Resolution would require a

credibility determination based on listening to and observing the individuals involved. Live hearings would be necessary so that a fact finder could see the individuals and make judgments as to their veracity. Accordingly, not only should the Commission allow the Common Carrier Bureau to assign an ALJ on the Bureau's own motion, the Commission also should allow a party to move for an ALJ to be assigned to the complaint case if the party can show that key issues of fact are in dispute.

F. Status Conferences And Formal Settlement Conferences Could Help Achieve The Commission's Goals (¶¶ 57-59)

The Commission proposes "to require that, unless otherwise ordered by the staff, an initial status conference take place in all formal complaint proceedings 10 business days after the defendant files its answer to the complaint." NPRM, para. 58. We agree that an early status conference can be very helpful to expedite the fair resolution of complaints. This proposed timing of the conference, however, would be overly burdensome when combined with the Commission's proposal "to require that objections to interrogatories must be filed by the date of the initial status conference...." (*NPRM*, para. 52), unless the Commission also revises its discovery rules. With the current rules allowing 30 written interrogatories as a matter of right, deciding which ones require objections and filing them requires more than 10 days from the filing of the answer. If, however, the Commission adopts our recommendation of limiting initial discovery to 20, single question, written interrogatories, then the proposed timing of the status conference may be reasonable.